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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Implementation of Sections 11)
 and 13 of the Cable Television)
 Consumer Protection and)
 Competition Act of 1992)
)
 Horizontal and Vertical)
 Ownership Limits)

MM Docket No. 92-264

SUPPLEMENTAL REPLY OF GTE

Pursuant to the extension of time granted in the above-captioned proceeding,¹ GTE Service Corporation ("GTE"), on behalf of the GTE Domestic Telephone Operating Companies and GTE Laboratories Incorporated, hereby supplements its Reply of March 3, 1993.

In that Reply, GTE urged the Commission to try to make more uniform the "crazy quilt of ownership attribution standards, which vary markedly among

¹ 58 Fed.Reg.12921, March 8, 1993, leaving record open until May 12, 1993. The FCC acted on the basis that the affiliation standards it would adopt in two dockets, MM 92-265 (program access) and MM92-266 (cable rates, especially for commercial leased access) might be relevant to affiliation standards for the purpose of measuring cable system ownership in this proceeding. As discussed below, the program access decision promulgated an affiliation standard but the cable rates decision does not appear to have taken separate account of affiliation in discussing the leased access rules. *Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, FCC 93-177, released May 3, 1993, ¶¶485-541.

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broadcast, cable, telephone and other regulated information industries.” (Page 3) GTE repeated its preference that “a control standard, or at least a threshold well above 5%, should be applied uniformly to comparable ownership attribution cases,” and suggested the analogy of cable-telephone affiliation limits in the new video dialtone rules. (Pages 4-5)

The Commission’s recent decision on the program access issues in MM Docket 92-265, FCC 93-178, released April 30, 1993, appears to reject a control standard to assess, for example, when a cable operator and a satellite cable programming provider are vertically integrated: “A behavioral test is necessarily ad hoc and therefore would not provide sufficient certainty.” (Order, ¶33) The decision accepts, however, the analogy between cable operator-programmer affiliations and cable-telephone relationships in video dialtone, and adopts the bare 5% equity limit allowed for video dialtone carrier investment in video programmers operating in the carrier’s serving area. (Order, ¶32)

GTE believes that, to the extent the Commission would be guided by the program access outcome in deciding ownership limits here, the decision in Docket 92-265 too quickly dismisses as *ad hoc*, and therefore uncertain, the behavioral tests developed over years of agency and judicial interpretation of “actual working control” under the broadcast attribution rules, 47 C.F.R. §73.3555, Note 1, and “transfer of control” under 47 U.S.C. §310(d). If case law over time has made these terms meaningful for Title III licensing purposes, why would they be too vague for the ownership limitations at issue in Docket 92-264?

In the program access decision, the Commission construed the intent of Congress in Section 628 of the Communications Act “to curb incentives for influencing the behavior of affiliates to the detriment of competitors.” (¶32) It likened this to the aim of the video dialtone decision released in August of 1992.

Such a cramped reading accentuates the negatives and ignores the positives of vertical and horizontal integration. By focusing solely on the risk of misbehavior by affiliates, this approach neglects the additional legislative purpose in Section 628(a) "to increase the availability" of satellite-delivered programming and "to spur the development of communications technologies."

Even as it adopts quite restrictive rules on cable operator affiliation with satellite programmers and telephone companies, the Commission is considering relaxing the broadcast attribution standards for the purpose of making more investment money available to that industry. There, by contrast, the focus is on the positives of "capital formation" rather than the perceived negatives of multiple ownership of radio and TV outlets in single markets.²

In similar respects, the direction of policy movement in the video dialtone decision was to encourage greater cross-investment and joint venturing between the cable and telephone industries, so long as this took place within the open-access model of the common carrier platform. The liberalization occurred after 22-plus years of singularly strict telephone-cable crossownership rules whose historical concern had been anti-competitive behavior. Clearly, the Commission has re-balanced its former view of the risks of undue influence in light of the benefits of technology investment.³ Accordingly, the stated goals underlying the video dialtone decision bear marked resemblance to the aims proposed by the Commission in the broadcast capital formation proceeding.⁴

² *Capital Formation Proceeding*, MM Docket 92-51, 7 FCC Rcd 2654 (1992).

³ Similarly, even as Congress was re-regulating the cable industry in 1992 it acknowledged the innovative cable programming and other benefits which had flowed from a deregulatory period of "consolidation in the cable industry." H.R.Rept. 102-628, 102d Cong., 2d Sess., 43.

⁴ Among the reasons cited in the Docket 92-51 Notice for relaxing the broadcast ownership attribution standards were the forthcoming implementation of "new technologies such as Digital Audio Broadcasting and Advanced Television." (§1).

This is not the place, and it is not GTE's objective here, to seek reconsideration of the program access decision's strict new rules on cable operator-programmer affiliation. However, that decision's rejection of the control test for limiting cable ownership must not be repeated in this docket. Instead, allowing minority ownership positions short of control (1) would be easy to administer based on legal and administrative precedents developed over many years, and (2) would give greater and much-needed encouragement to intra-industry and cross-industry investments in advanced technologies.

For the above reasons, and in the added interest of regulatory parity, if the FCC determines to apply a control test or a numerical standard above 5%⁵ to define ownership attribution here, equity demands adoption of the same liberalization on reconsideration in the video dialtone proceeding.

CONCLUSION

The rationale for the restrictive affiliation standard adopted in the program access proceeding, MM Docket 92-265, namely the curbing of perceived incentives for anti-competitive behavior, should not be imported into this docket and should not be attributed as the basis for the video dialtone decision.

⁵ The broadcast capital formation proceeding proposes raising from 5% and 10% to 10% and 20% for active and passive interests respectively. the limits on non-attributable ownership

A "control" standard of affiliation -- or at least a higher numerical threshold than the 5% operator-programmer integration imposed in Docket 92-265 -- is both workable and more supportive of advanced technology investment. Encouraging the continued flow of funds into communications development is consonant with the Commission's policy foundation for video dialtone and Congress' desire to check but not cripple the cable television industry.

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Supplemental Reply of GTE" have been mailed by first class United States mail, postage prepaid, on this 12th day of May, 1993 to all parties of record.


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